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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 71-129

ILLINOIS STATE TRUST COMPANY, a Corporation, Guardian of the Estate of DANIEL DAVID LAND, a Minor, and ARTHUR LAND, Petitioners,

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI

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v.

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PETITION FOR WRIT OF CERTIORARI

Petitioners represent to the Court that this case was originally tried in the United States District Court for the Eastern District of Illinois, at which time the trial court directed a verdict in favor of the respondent at the conclusion of the petitioners' evidence. The trial court entered an opinion which is appended hereto. Thereafter an appeal was taken to

the United States Court of Appeals to the Seventh District where an opinion was entered on March 10, 1971, affirming the action of the trial court. A copy of that opinion is also attached hereto. That thereafter the petitioners filed a Petition for Rehearing which was denied on April 5, 1971, and thereafter on the 26th day of April, 1971, a Mandate, a copy of which is also appended, was issued by the United States Court of Appeals which affirmed the decision of the District Court in accordance with the opinion of March 10, 1971. That the opinion of the Court of Appeals was published officially in 440 F.2d 497-502.

That the petitioners are seeking a review of the decision of the United States Court of Appeals for the Seventh District, primarily upon the basis that the opinion of the United States Court of Appeals is in direct conflict and contrary to an established body of cases decided by the Appellants Courts of Illinois on the important question of the responsibility and duty of a railroad to minor children who have occasion to be injured on the railroad right-of-way after having been attracted and lured to that location by the affirmative actions of railroad employees. Petitioners assert that the

effect of the trial court's ruling and the affirmation by the Court of Appeals is such as to deny recovery to the petitioners in this case whereas plaintiffs have successfully recovered in similar factual situations in cases tried in the state courts of Illinois. Petitioners assert that they have been denied equal treatment and equal protection of the law. Petitioners further represent that the decision of the Court of Appeals in the present case is in direct conflict with a prior decision entered by the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED FOR REVIEW

Did the trial court rule correctly in denying, after removal, plaintiff-appellants' Motion to Remand to the State Court in view of the facts that defendant maintains more trackage in Illinois than in Missouri, defendant earned greater revenues in Illinois than in Missouri, defendant's principal repair facilities are located in Illinois, defendant maintains switching facilities in Madison and St. Clair Counties in Illinois, the president of defendant corporation and vice-president in charge of sales live in Illinois, and defendant owns 1,394.72 acres of land in

Illinois and only 698.7041 acres in Missouri?

Did the trial court rule correctly in granting defendant's Motion for Directed Verdict notwithstanding uncontradicted evidence that defendant's employees habitually and continuously over a period of many years threw flares to minor children at the Cargill Road crossing in Cahokia, Illinois, an area where large numbers of children were known to play, and did thereby entice and attract the plaintiff-appellant, a seven-year old boy, to go onto the tracks looking for flares where he was seriously injured after attempting to hop a ride on defendant's train?

STATEMENT OF THE CASE

This action was brought on behalf of an eight-year old boy, Daniel David Land, and his father to recover damages for personal injuries and medical expenses resulting from an accident which took place on the 30th day of March, 1969, at defendant's Cargill Road crossing which is located in Cahokia, Illinois. Plaintiffs' Complaint was filed in the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, in May, 1969 and thereafter

defendant filed its Notice and Petition for Removal of the action to the U. S. District Court for the Eastern District of Illinois. Defendant asserted that its principal place of business was the State of Missouri, but the plaintiffs, after securing answers to interrogatories concerning defendant's operations, filed their motion to remand the action to the State Court, which motion was denied. The cause was tried during the first week of April, 1970 and at the close of the plaintiffs' evidence, the trial court granted defendant's Motion for Directed Verdict and it is from that order that this appeal is taken.

On March 30, 1969, Daniel David Land, was seven years old and in excellent health. He lived with his parents and his brothers and sisters in Cahokia, Illinois, and was in the first grade in school, although he actually should have been in the second grade and was held back for a semester because he was immature and he had problems with sleeping in class. The day of the accident was Sunday and David played around his house with a neighbor boy by the name of Jimmy Bell until approximately 3:00 p.m. when his mother asked them to go outside because they seemed to be upsetting David's younger sister, Connie,

who was fatally stricken with leukemia. The boys left the Land home on Jimmy Bell's bicycle and after riding around a circular roadway where the Land home was located, they went to a service station which was next to the Cahokia Police Station and a historical courthouse. After getting a drink at the service station, the boys went to the area of the Cargill Road crossing to hunt for railroad flares. Jimmy Bell had been to the railroad crossing previously four or five times to hunt flares and had in fact obtained them from railroad crewmen. Jimmy Bell on previous occasions had obtained flares from crewmen and thrown them across the tracks into the weeds on occasion and on occasion had thrown flares into a pond which is located across the tracts. Jimmy Bell had hopped trains prior to the day that David Land was injured and he always hopped them there at the road crossing. David Land testified that he went on the railroad tracks to hunt for flares and he described what flares looked like and said that if he got any of them that they were going to throw them into the water. After going onto the railroad tracks, the boys tried to hop a ride on one of the defendant's trains,

Jimmy Bell hopped on one car and David Land when attempting to catch a ride on another car fell under the train and was very seriously injured. Numerous children from the Cahokia area were called as witnesses and testified that large numbers of children have occasion to be present at the Cargill Road crossing for the purpose of obtaining flares; testimony was also presented by the children and others that the Cargill Road crossing was in close proximity to the Cahokia City Hall and a historical courthouse and that there are playgrounds and a basketball court in that immeidate area. The children also testified that there is a pond and clubhouse on the other side of the railroad tracks where many of the children go to play and that quite often they are going back and forth between the playground-City Hall-courthouse area and the area where the pond and clubhouse was located and in order to get from one location to the other they have to cross the Cargill Road crossing. Curtis White, defendant's locomotive engineer, testified that he was operating Engine No. 555 in the late afternoon on March 30th at the Cargill Road crossing when David Land was injured.

The train was made up at Wiggins No. 2 in East St. Louis and the destination was Dupo. As the train was traveling south, it came to a switch at the Cargill Road crossing which was improperly lined and since it was not an automatic switch but had to be manually operated, the train stopped for approximately 60 seconds and then proceeded in a southerly direction. The engineer testified that he has crossed the Cargill Road crossing many times prior to March 30th, 1969, and that he has frequently seen small children playing in that area. The engineer testified that he has a manual of instructions and that he had them with him on the date of the accident and that they impose an obligation upon every member of the crew to maintain a lookout for pedestrians and automobiles. The engineer said that the Terminal Railroad Association owns the trackage at the Cargill Road crossing and that no other trains are operated over that trackage except the New York Central, now the Pennsylvania Central which trains are operated by Terminal Railroad Association employees. He indicated that the Terminal engines are all red and that the Pennsylvania Central engines are black, usually, and their cabooses are green. The children who testified

indicated that they obtained flares from the Terminal trains and the New York Central trains and some of the children could merely describe the engines as being red or black and the cabooses as being red or green. The engineer testified that he saw a boy and a dog when crossing the Cargill Road crossing at the time when his engine was approximately 25 car lengths south of the crossing. But he didn't know the boy had been injured until he had reached Dupo. William R. Hall, the switchman on the train in question, had been over that crossing many times and had on many occasions seen many small children at that crossing. He reported that condition to the authorities at the Terminal Railroad on more than one occasion. But he had seen the children there after he reported it. He testified that he did not recall ever having seen any railroad detectives at the Cargill Road crossing. The switchman also testified that the employees of the railroad can obtain flares upon request and that after obtaining them that the practice is simply to keep them with them until they are ultimately used if they are not used on the occasion they are obtained. David Land experienced

a crushing injury to the left thigh and a crushing injury to the right os calcis with an open fracture of the left femur and an open fracture of the right os calcis. He had a severely comminuted fracture of the thigh bone which was stabilized with a metal nail inserted in the bone marrow. In October of 1969, the fracture had not healed and the boy underwent further surgery at which time the metal rod was removed and a portion of the iliac or hip bone was placed in the area of nonunion at the site of the fracture. The boy remained in a body cast until after January, 1970. Examination during the week of the trial revealed that the boy had limited range of motion of his left hip and perhaps five degrees to his left knee. The possibility that David will ever regain complete range of motion is probably very, very small. The plaintiff, Arthur Land, incurred the following expenses for the care and treatment of David: St. Mary's Hospital, $1,400.00; Dr.Meirink, $700.00; and Dr. Guerra, $500.00.

ARGUMENT

In cases of removal, the petitioner has the burden of proof and if federal

jurisdiction is doubtful, the case will be remanded; in other words, the federal court is justified in assuming jurisdiction only if jurisdiction is clearly shown.

The law does and should hold land owners responsible for injuries resulting to children from dangerous instrumentalities located upon their property when the land owner routinely and customarily entices children onto its premises knowing that activities dangerous to minor children are conducted on that property. There is no requirement under Illinois Law that the attractive agency must be the instrumentality which ultimately inflicts the injury since the true basis of liability is foreseeability of harm to the children. In the present case, it was clearly established by the testimony of defendant's engineer and switchmen that they knew large numbers of children played in the are of the Cargill Road crossing; the switchman, as a matter of fact, reported it on several occasions to the railroad, but nothing whatever was done to prevent the children from coming onto the tracks and as a matter of fact, the practice of enticing them there by dispensing flares to them was continued. Under the facts of the case it is both incredible and unconscionable that the minor child should not recover for his injuries.

As disclosed in defendant's answers to interrogatories, his answers to interrogatories not objected to and answers to supplemental interrogatories, defendant maintains 187.0 miles of track in the State of Illinois whereas it maintains only 146.19 miles of track in Missouri; during the year 1968, defendant earned revenues in the amount of $15,177,368.00 in the State of Illinois and only $10,508,069 in the State of Missouri; defendant's principal repair facilities are located in Madison County, Illinois, and in St.Clair County, Illinois; and its president lives in Belleville, Illinois and its executive vice president lives in East St. Louis, Illinois; finally, defendant owns almost exactly twice as much land in Illinois, 1,394.72 acres, as it does in Missouri, 698.70 acres. In determining the principal place of business of a railroad corporation, a number of facts should be considered, including, the place where the executive officers reside; the place where the principal contacts with customers are carried on; the place where the largest operating revenues are earned; the place where the larges portion of the trackage is located; the state in which the highest percentage of operating revenue is derived; the place where the repair facilities are located. Gilardi v. Atchison, T. & S.F. Ry.

Co., 189 F. Supp. 82 (D.C.N.E.Ill.,E. D., 1960). Other significant factors are: in what state do the majority of the employees work and where is the largest portion of tangilbe property located. Kelly v. U. S. Steel Corporation, 284, F.2d 850 (1960). The petitioner has the burden of proof on those issues, and if federal jurisdiction is doubtful the case will be remanded. Wells v. Missouri Pacific RR. Co., C.C.A. 8th, 1937, 87 F.2d 579; Stevenson v. Illinois Central RR. Co., C.C.A. 6th, 1911, 192 F. 956; Groel v. United Electric Co. of New Jersey, C.C. N.J., 1904, 132 F. 252. In other words, the federal court is justified in assuming jurisdiction only if jurisdiction is clearly shown. Dodd v. Louisville Bridge Co., C.C. Ky., 1904, 130 F. 186.

An examination of the substantive law of Illinois with regard to attractive nuisance cases and actions against railroads brought on behalf of minor children injured on railroad property indicates that the facts of the present are much stronger and more persuasive than any case yet decided.

In Kahn v. James Burton Co., 126 N.E. 2d 836, 5 Ill.2d 614, a case decided by the Supreme Court of the State of Illinois in May, 1955, an eleven-year old boy brought action by his father for personal injuries sustained when a lumber pile on which he

was playing collapsed. The pile of lumber was placed on a corner of a lot within 15 feet of the intersection of two public alleys and on prior occasions several children had played on a mound of dirt located on the same property. The plaintiff had never played on the lot before he and a companion stopped their bicycles and went upon the piled lumber on the day in question. The plaintiff climbed upon the pile and the planks gave way causing him to fall and sustain serious injuries. The defendant lumber company contended that it owed no duty to anyone other than the owners of the property and the contractor and that since it was not in possession or control of the premises it could not be held liable to the plaintiff. The Supreme Court rejected that contention (126 N.E.2d at page 839):

> "Insofar as the lumber company is concerned, plaintiff was not a trespasser; and it should have reasonably anticipated that children might come upon the premises and be injured, the fact that it did not own or control the premises cannot relieve it from liability for the consequences of its negligence."

The court went on to say on page 840 that the questions as to whether the lumber was so piled as to create an unreasonable danger to children playing thereon and

whether it was so attractive to children as to sugges the probability that children would climb onto it, were questions for the jury under circumstances in the record. The court then stated:

> "The creator of certain conditions dangerous and hazardous to children because of their immature appreciation of such dangers and hazards must be held to a certain standard of conduct for the protection of children in accordance with the attendant circumstances and conditions. Account must be taken of the cost and burden of taking precautionary measures and the right of families and society to rear and develop children with freedom of activity in their community without being subject to unreasonable risks which might cause certain injury or death to such children. All men are presumed to know those things which are matters of common knowledge and must be held in absence of actual knowledge or notice, to have reasonably anticipated such occurrences as in the ordinary nature of things, reasonable men should know will probably occur.

* * * * * * * * * * * *

"The duty to exercise ordinary care to avoid injury to another does not

> depend upon contract, privity of interest, or the proximity of relationship, but extends to remote and unknown persons (Citation). The test in the case at bar is whether the lumber company in the exercise of ordinary care could reasonably have anticipated the likelihood that children would climb onto the lumber and would be injured if it were not securely piled."

The court went on to say that it thought the jury was justified in its finding in favor the plaintiff because of the proximity of the lumber to the public alleys, the fact that it was delivered during the summer vacation in a populous community and the fact that defendant should have known that it would likely attract children who might be injured. The court went on to say on page 842 that in cases where the owner or person in possession known or should know that young children habitually frequent the vicinity of a defective structure of dangerous agency existing on land which is likely to cause injury to them, because they, by reason of their immaturity are incapable of appreciating the risk involved and where the expense or inconvenience of remedying the condition is slight compared to the risk of the children, that there is a duty upon the owner or person in possession to exercise due care, to remedy the condition or other-

wise protect children from injury resulting from it. The court said that the element of attraction is significant only insofar as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child. The court then again stated in the Kahn case, the questions of enticement, a dangerous condition, and anticipation of an accident were properly matters for determination by the jury.

Petitioners respectfully submit that the Court of Appeals in its decision in the above cause ignored or disregarded the case law of the State of Illinois as it has developed over the past fifteen years and erroneously attempted to apply a 1948 case, Briney v. Illinois Central RR., 401 Ill. 181, 81 N.E.2d 866, to the present case. Even more strangely, this Court disregarded its own decision in Blaauw v. Grand Trunk Western RR. Co., 7th Circuit, 333 Fed.2d 540, in affirming the dismissal of plaintiff's complaint. The Court further indicates on page five of its opinion that it had not been able to discover any post-Kahn Illinois case which has held an owner or possessor of land liable where the immediate cause of injury to a child has not been either the attracting agency itself or some negligence chargeable to the defendant

other than the negligence inherent in the creation or tolerance of the attraction which resulted in the child's presence.

We submit that the Courts of Illinois have permitted a 14 year old boy to recover for serious injuries which he sustained in Dickeson v. Baltimore & Ohio Chicago Terminal R.R. Co., 245 N.E.2d 762, 42 Ill. 2d 103. In that case the plaintiff flipped a ride on a slow moving train after using a well worn path in a populous neighborhood to reach the track. The plaintiff was seen by the engineer prior to flipping a ride but the engineer, of course, had no way of knowing that the child would in fact climb onto the train and experience injury. Nonetheless, the Courts of Illinois permitted that boy to recover $116,480.00 with the Supreme Court stating that whether the plaintiff was in a place of danger is a factual matter for the jury's determination. Compairing the facts of the Dickeson case where the railroad did nothing affirmative to attract or allure the plaintiff or other children onto its right of way with the facts of the Land case wherein it is uncontradicted that the railroad employees over a protracted period of many years had dispensed flares to children at the crossing where plaintiff was injured, it is inconceivable that the Dickeson boy should recover and the Land boy should not.

In the American National Bank and Trust Co. v. Pennsylvania R.R. Co., 52 Ill. App.2d 406, 202 N.E.2d 79, aff'd 35 Ill.2d 145,219 N.E.2d 539, Cert. Denied 87 Supreme Court 777, 17 L.E.2d 683, the Courts of Illinois again permitted a 13 year old boy to recover for the amputation of his legs and to receive a jury verdict of $275,000.00 on facts almost identical to the facts in the present case. There was evidence, however, in the American National Bank case that a railroad detective had expressly warned the plaintiff to stay off the track shortly before he was injured. In that case the children would go onto the tracts seeking chalk. Sometimes they would receive it and sometimes they would not. As in the Land case, the plaintiff had never gotten on any railroad case previous to the date of the accident but on the day of the accident he jumped on a railroad car and was injured when he attempted to disembark. Similarly to the situation in the Land case where David was jostled or pulled off the car by his dog Snoopy, in the American National Bank case, the plaintiff experienced injury when he bumped into a playmate and lost his balance falling under the train. The Court went into a lengthly discussion of the applicable law in the State of Illinois and distinguished between the application of Kahn v. James

Burton Co., 126 N.E.2d 836, 5 Ill.2d 614 and Briney v. Illinois Central R.R., 401 Ill. 181, 81 N.E.2d 866. The Court expressly stated that in the American National Bank case, that it was of the opinion that injuries to a child from a moving train can come within the scope of the Kahn rule. The Court went on to say that the Briney case was decided seven year before the Kahn case and was not tried on the attractive nuisance theory which was then the law in Illinois, but rather on the novel theory that the plaintiff was on the defendant's property to help the railroad men do their work. The Court further stated:

> "The Court in the Kahn case noted the Briney decision but then in effect stated that it did not apply were harm from an object on the land was foreseeable to children who were enticed upon the land by the allurement of the object."

The question of foreseeable trespass was not even raised in the Briney case as it was in the Kahn case and in the American National Bank case. The Court then quoted the essential language from the Kahn decision which is

> "The element of attraction is significant only insofar as it indicates that the trespass should be anticipated, the true

> basis of liability being the foreseeability of harm to the child."

The Court then stated in American National Bank case that the plaintiffs in the Briney and Jones cases, on the other hand, were denied recovery due to the element of trespass. The Kahn rule must therefore take precedence over the Briney and Jones cases where trespass by children and resulting harm are foreseeable. In the Land case the foreseeability of harm to children was obvious, the railroad knew the children were on the premises and knew that its employees had lured them there. The Court then referred to the case of Blaauw v. Grand Truck Western R.R. Co., 7th Circuit, 333 Fed.2d 540, a case decided by this very court. The Court in the American National Bank case then made the following comments with regard to the Briney case,

> "We find no conflict between the views presented here and those presented by the United States Court of Appeals for the Seventh Circuit in the recent case of Blaauw v. Grand Truck Western Railroad Company, 7 Cir., 333 F.2d 540. John Blaauw, a five year old boy, was injured by defendant's railroad train. He and two companions were on defendant's right of way, having gained access thereto by an unfenced

culvert which was frequently used by the neighborhood children to get to a small pond of water on the right of way. Blaauw crawled between two railroad cars and after he got to the other side the train began to move. He took hold of a grab-bar on the car, ran with the train a short distance, tripped and fell under the wheels. Plaintiff maintained at trial that (1) defendant had violated its common law duty to fence the area and to take necessary precautions under the circumstances in accordance with the Kahn rule and (2) defendant had violated the duty to fence imposed by an 1890 Chicago ordinance as continued in force and effect by General Order 121 of the Illinois Commerce Commission; and that this was the proximate cause of his injury. The trial court directed a verdict for defendant on the ordinance count, relying on General Order 138 as the basis therefore, and the jury found for the defendant on the common law count. Plaintiff appealed, alleging (1) that the verdict was against the manifest weight of the evidence and (2) that the trial court erred in directing

> a verdict for the defendant on the ordinance count for the reason that General Order 138 was in effective due to procedural errors on the Commission's part in adopting the order. The Court of Appeals affirmed, holding that the questions of negligence, proximate cause and damages were jury questions and that the reviewing court will not interfere unless it is clearly evidence that the verdict is against the manifest weight of the evidence; that the jury could reasonably have found that the defendant's conduct was not the proximate cause of the injury."

In the Blaauw case the Court of Appeals for the 7th Circuit stated that questions of negligence, proximate cause and damages are pre-eminently questions of facts for a jury's determination even though under the facts in that case there was no indication that the railroad had attracted the five year old boy onto its premises nor had they even been aware of his premises there. Nonetheless, as indicated, the Court of Appeals said that questions of negligence, proximate cause and damages were pre-eminently questions of fact for the jury. Why or how the Court could hold otherwise in the

instant case, is beyond the comprehension of the Petitioners.

In a post-Kahn case which was called to the attention of the Court of Appeals during oral argument, Holloran v. Belt Railway Company of Chicago, 25 Ill.App.2d 114, 166 N.E.2d 98, a 13 year old boy slipped and fell under a railroad car about thirty feet from a sand pile which was located on defendant's property enjoining a railroad embankment and on which the child had been playing, the trial court entered a judgment for the defendant which judgment was reversed by the Appellate Court, which stated that there were triable issues of fact as to whether the sand pile was sufficiently attractive to entice children into playing upon it, whether its location would involve danger in reaching it and whether defendent should have anticipated the possibility of injuries to children either from the sand itself or in crossing the tracks to reach it. The Court stated that the 13 year old boy who loses a leg is entitled to have his case submitted to a jury, again, on facts far less persuasive than the Land case. The Court again quoted extensively from Kahn, Jones, Briney, indicating,

> "Every person owes to all others a duty to exercise care to guard against injury which may naturally flow as a reasonable, probable and foreseeable consequence of his

> act, and the law is presumed to furnish a remedy for the redress of every wrong. The duty to exercise ordinary care to avoid injury to another can extend to remote and unknown persons. The creator of conditions, dangerous and hazardous to children, because of their immature appreciation of such dangers and hazards, must be held to a standard of conduct for the protection of such children, in accordance with the attendant circumstances and conditions."

In the Halloran case the child was not injured by the attracting agency or by any positive form of negligence chargeable to the defendant. The Petitioners have cited several other cases in their brief, such as Henry v. Robert Kettell Construction Corp., wherein the child was injured when struck by a truck after having been attracted to the premises by other agencies. There was no evidence in the Henry case that there was affirmative negligence in the operation of the truck other than it was simply being operated upon the premises where the child had been attracted. In its opinion in this case, this Court referred to the Henry case and in some manner distinguished it from the Land case but that distinction elludes the petitioners for the reasons above stated. We submit that Henry is directly analogous. The Court of Appeals in this

case said it was unable to identify any negligence of the defendant other than the obvious negligence in permitting its employees to throw flares to the children. Why this obvious negligence is not important to the Court of Appeals in view of the various quoted cases is not clear in view of the great significance that all of these cases place upon foreseeability of harm to children. The enormous burden that the Court alludes to in its decision deals, of course, with the probability of fencing right of ways and the construction of over-passes, which would, indeed, be a substantial burden; however, the Court again ignores the obvious condition which should be corrected at minimum cost, to-wit, the cessation of alluring children to the premises by dispensing flares to them. Another case in which a minor plaintiff was allowed to recover where he experienced injuries not as a result of being injured by the agency that attracted him to the place and not by any affirmative act on the part of the defendant was Kleren v. Bowman, 145 N.E.2d 810; 15 Ill.App.2d 148. When the Court of Appeals indicated that it could not discover any cases of this type, the Petitioners can only wonder if their brief was reviewed at all by that Court.

The defendant cited a case in his brief Sydenstricker v. Chicago & N.W. Ry. Co.,

107 Ill.App.2d 427, 247 N.E.2d 15, in which a 9 year old boy was injured on a railroad which had stood still on the railroad property for a period of only 3 or 4 days. The Illinois court in that opinion said that there was no recovery because the car was not moving and did not present any unreasonable risk. The Court then quoted the following language from Dickeson,

> "A moving railroad train is certainly an instrumentality of great potential danger to children. . ."

And the Court further indicated,

> ". . . the railroad owed a duty of ordinary care to see that these children were not injured by their moving train."

The Court then quoted Trobiani v. Racienda, 95 Ill.App.2d 228, 233, 238, N.E.2d 177, 179, where the Court said,

> "Since the Kahn case, to impose liability it must be shown: (1) the occupier knows the young children frequent the vicinity; (2) there is a defective structure or dangerous agency present on the land; (3) that structure or agency is likely

> to cause injury because of the child's inability to appreciate the risk; and (4) the expense of remedying the situation is slight."

In the present case there is absolutely no question that the railroad knew that young children frequented the vicinity, there is no question that a dangerous agency, to-wit, a moving railroad train was present on the land; there is no question that the agency was likely to cause injuries because of a child's inability to appreciate the risk; and the expense of remedying the situation, that is of preventing the railroad employees from dispensing flares and alluring children onto its premises, was slight. Furthermore, had the crewmen on the train in question following their manual of instructions and maintained a lookout perhaps David Land would have avoided permanent injury and disability. This act of negligence, the failure to maintain a lookout for children the defendant knew were on its premises, and had in fact invited there, is the other chargeable negligence that the Court of Appeals incredubously ignored in its opinion when it stated that it had not been able to discover any post-Kahn Illinois case which held the owner or possessor of land liable where the immediate cause of the injury to a child had not been either the attracting

agency itself or some "negligence chargeable" to the defendant other than the negligence inherent in the creation or tolerance of the attraction which resulted in the child's presence.

The petitioners earnestly and prayerfully request the Court to review the judgment and opinion of the Court of Appeals because it is of extreme importance that the citizens of this State be treated fairly and equally by the Courts and that recovery not be denied to one child merely because perhaps a different panel of judges sits in judgment of a given case. If recovery is permitted in the Dickeson case and the American National Bank case and the Henry case and other cases cited by Petitioners and if the Court of Appeals makes a solemn expression of its opinion as the law in Illinois in cases of this type indicating that questions of negligence, proximate cause and damages are pre-eminently questions for the jury, as in the Blaauw case, how can David Land be denied his right to present his case to a jury for his injuries which will be permanently disabling. How can any lawyer, in reading the opinion reached, intelligently advise his clients as to their rights if the Courts do not follow previous case law and their own dictates. In the present case the Petitioner's attorneys rejected a settlement offer of

$45,000.00, knowing that their clients had the right to submit their cases to the jury. We submit that the decision in the present case was contrary to the law of Illinois, inconsistent with the previous expressions of the United States Court of Appeals for the 7th District and unconscionable in its effect upon the petitioners.

Respectfully submitted,

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A P P E N D I X

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF ILLINOIS

ILLINOIS STATE TRUST COMPANY, a Corporation, Guardian of the Estate of DANIEL DAVID LAND, a Minor, and ARTHUR LAND,

Plaintiffs,

vs. Civ. No. 69-82

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,

Defendant.

APPENDIX
2a

RULING OF THE COURT

The Court: Well, this is usually the most difficult time of any lawsuit. It is after the plaintiff's testimony is in, and then the Court is presented with a motion for a directed verdict. Many times that burden is greater than at other times; and what makes it greater in some instances than in others are the circumstances involved in that particular lawsuit. This Court last night took considerable time to review the evidence and the law applicable thereto; and the Court did make some notes. The testimony that we heard here this morning did not materially change the notes that I made last night. I kept myself open, my mind open that if there was some testimony this morning that would change it, I could be flexible; and I think accordingly. But in considering all of the testimony, there is only one conclusion that this Court can come to, and that is that the motion for a directed verdict must be allowed; and I am going to read the reasons therefor to put them in the record. The evidence showed that certain boys, not including the plaintiff, had been in the habit of standing along the railroad tracks of defendant's tracks and asking the trainmen for fuses. There is not evi-

dence that these fuses were thrown promulgously by the trainmen, but only at the request of the boys. There is no indication that there was any request for fuses made at the time of the incident, because the engine had already passed over the crossing together with about eight or ten cars; and the caboose was some fifteen or sixteen cars from the crossing where the plaintiff was standing. If there was a certain invitation to the boys, it had not yet been placed into effect, because neither boy saw a man on the engine or caboose so they could make a request for fuses, nor did they see any trainmen on any of the cars between the engine and the caboose to whom they could make the request. Plaintiff had never before been at the tracks to ask for fuses, and his little friend did not tell him why they were going to the tracks. Their mission, if any, had not yet started when plaintiff attempted to hop the train. When plaintiff attempted to hop the train, his dog, Snoopy, jumped on him and started barking, which caused him to jump or slip from the car he was starting to hop. There is nothing in this record to show nor any testimony to show from which it can properly be inferred that plaintiff knew of the habits of other boys in asking for fuses. Plaintiff having no knowledge of the habits of other boys with respect to asking for fuses, it cannot be said that he was along the right-of-way as a result of an implied invitation. When

the engine passed over the crossing, neither the boy nor the dog were visible to anyone in the engine. After the engine and about eight or ten cars had passed over the crossing, the engineer looked back and saw some boys there at that time, saw the two boys and the dog standing about six or eight feet, a safe distance, from the track. No other trainmen saw the boys, not did anyone see the boys hop or try to hop the train. If the boys were there to ask for fuses, they did not have that chance, because the engine had passed them, and the caboose was not yet there. In the interim they did what they did with the resulting tragedy. The plaintiff in the interim had no express or implied invitation. If, in fact, the plaintiff knew why he was there, which this Court finds he did not, consequently there is no invitation. His injury was not in connection with the alleged invitation to come on the premises and ask for fuses, but it was in connection with an act which was not related to the request for fuses. There is no testimony that the boy had been in the habit of jumping on trains, nor is there any testimony that the defendant had knowledge or any reason to believe that it had knowledge that the boys were jumping on trains. It is the evidence they climbed up some-

where near the middle of the train, which was not connected with the mission for which he was there. If in fact, he knew what the mission was, he became a trespasser. As a trespasser, the railroad was not liable for negligence, but only not to wilfully and wantonly injure him and to use ordinary care to avoid injury to him after his presence on the premises in a place of danger has been discovered. Plaintiff was not struck by the train nor by any protrusion from it. He fell under it while trying to jump on it at about the middle of the train. Neither under the attractive nuisance law nor under any law can this plaintiff recover. Those are my reasons for allowing the directed verdict. It is unfortunate, but the Court does not make the law. Bring in the jury, please.

DIRECTION OF VERDICT

The Court: Ladies and gentlemen of the jury, when the Court examined you yesterday morning the Court told you, as it did on a number of previous occasions, that you are the judges of the facts in each and every case that you try; and the Cout is the judge of the law. That generally is true. There is one exception,

and that is this: that if during the course of a lawsuit, the court is of the opinion that there is no liability, no case made which is submissible to the jury, then it is the court's duty and obligation to withdraw the case from the jury. This Court has determined that regardless--and this court is sympathetic to this boy--that there is no liability here on the part of the railroad; and for that reason the Court is withdrawing this case from the jury and shall enter what we call a directed verdict in favor of the defendant. That is the order of the Court. The Court now is withdrawing a juror and excusing you. You will not be asked to return. This completes your service and the Court appreciates the services you have given to us and your cooperation. Mr. Bailiff, this court now stands adjourned.

APPENDIX
6a

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970--JANUARY SESSION, 1971

NO. 18534

ILLINOIS STATE TRUST COMPANY, a Corporation, Guardian of the Estate of DANIEL DAVID LAND, a Minor, and ARTHUR LAND,

Plaintiffs-Appellants,

v.

TERMINAL RAILROAD ASSOCATION OF ST. LOUIS, a Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

March 10, 1971

Before SWYGERT, Chief Judge, CUMMINGS and STEVENS, Circuit Judges.

SWYGERT, Chief Judge. This is an appeal from the granting of defendant's motion for a directed verdic at the close of plaintiffs' evidence and the judgment entered thereon in a personal injury action removed to the district court pursuant to 28 U.S.C. Sec. 1441(a) on the ground of diversity of citizenship, the jurisdictional amount-in-controversy requirement having been met. The cause of action arose out of an accident which occurred at the crossing of a public road over defendant's railroad right-of-way in Cahokia, Illinois, in which a young boy fell under the wheels of a railroad car while attempting to "hop a ride" on defendant's train, suffering serious injuries.*

The facts before the trial court upon which the directed verdict was predicated are as follows. On March 30, 1969, David Land, then seven years of age, and Jimmy Bell, his friend of the same age, decided while playing together to ride Jimmy's bi-

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*The complaint is in two counts. Count 1 asserts a claim by Illinois State Trust Company as guardain of the estate of Daniel David Land, a minor; Count 2 asserts a claim by the father of Daniel David Land for medical expenses.

cycle to a service station in Cahokia "to get a drink." The two boys then set out for the Cargill Road railroad crossing nearby "to hunt for flares"--that is, to search the tracks for the red pyrotechnie flares sometimes used and carried by railroad men for signalling purposes. The boys were accompanied by "Snoopy," the Land family's dog. Jimmy hid his bicycle in the brush, and the two boys walked to the crossing. While they were drawing near to the crossing, defendant's train came to the crossing and stopped for about a minute so that a switch could be operated by the conductor to properly align the tacks for proceeding in the intended direction. The train then started up again. The two boys were apparently unobserved by any of the train crewmen at that time, although the engineer testified he saw one boy and a dog some distance from the tracks after the train was entirely past the crossing. As the train was passing through the crossing, Jimmy Bell climbed on a ladder at the rear of one boxcar. David Lan then attempted to climb on a ladder at the front of the car immediately behind the one Jimmy was riding, but, as David attempted to board the train, "Snoopy," the dog, barked and jumped at the boy causing him to trip. David fell beneath a railraod car within a few feet of the crossing and suffered

serious injuries to his left leg and right foot.

Also before the court was testimony that children had found partially burned flares along the tacks and had been given flares by railroad crewmen from time to time. Several children testified that if they stood near defendant's tracks at the crossing and elsewhere and called to the crewmen to throw them some flares, their efforts were rewarded more often than not by compliance with their requests. They further testified that the flares were sometimes thrown to them from the engine but more often came from the caboose. There was also testimony that children had hopped rides on trains at the crossing and elsewhere. However, there was no testimony that any of the crewmen on the train involved in this accident had ever given away flares or observed children hopping rides on trains in or near Cahokia. Two crewmen testified that they had observed children playing in the vicinity of the Cargill Road crossing--indeed, the switchman had reported that fact to his supervisor--but there is nothing in the record to indicate that the railroad had knowledge of any fact which would indicate that the Cargill Road crossing was particularly dangerous or that children were playing on

the tracks or dangerously close thereto.

Plaintiffs raise two issues on this appeal: (1) did the district court err in denying their motion to remand the cause to the state court from which it was removed and (2) did the district court err in granting defendant's motion for a directed verdict, considering the foregoing evidence? We affirm the decision of the district court as to both issues.

I

Plaintiffs contend that the district court should have granted their motion to remand the action to the state court from which it was removed because diversity of citizenship between the parties was lacking; hence the district court was without subject matter jurisdiction. This argument is based on the theory that defendant was a citizen of Illinois for diversity purposes as are all of the plaintiffs. We agree with the district court that the defendant is a citizen of Missouri and that the motion to remand was without merit.

Pursuant to 28 U.S.C. Sec. 1332(c), a corporation, for purposes of diversity jurisdiction, is a citizen of both the state of its incorporation and the state which is

the situs of its principal place of business. The evidence shows that the defendant is a Missouri corporation, that is general offices and headquarters are located in Missouri, that its shareholders and board of directors hold all of their meetings in Missouri, that the vast majority of its officers have their offices in Missouri, that all its basic corporate records are kept in Missouri, that all its tax returns are prepared in and filed from Missouri, and that all its banking is conducted in Missouri. It is thus clear that Missouri is the only state of defendant's citizenship, despite the defendant's extensive operations in Illinois. Celanese Corp. v. Vandalia Warehouse Corp., 424 F.2d 1176 (7th Cir. 1970); Sabo v. Standard Oil Co., 295 F.2d (7th Cir. 1961).

II

Plaintiffs further contend that the trial court's direction of the verdict against them was erroneous. Although there is disagreement among the circuits as to whether a federal standar for direction of verdicts or a state standard applies in diversity cases, e.g., Boeing Co. v. Shipman, 411 F.2d 365, 368 n. 2 (5th Cir. 1969), it is settled that in this circuit the applicable state standard applies. Wieloch v. Rogers Cartage Co., 290 F. 2d 235, 237-38

(7th Cir. 1961). It is undisputed that Illinois law governs this cause of action, and the Illinois standard for direction of verdicts has recently been clarified. As the Illinois Supreme Court states in Pedrick v. Peoria & E.R.R., 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (1967):

> In our judgment verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelming favors movant that no contrary verdict based on that evidence could ever stand.

Our inquiry thus is directed to a determination of whether a verdict for plaintiffs based on the evidence stated above "viewed in its aspect most favorable to (plaintiffs) . . . could ever stand." Id.

The claims of the plaintiffs in the instant case are in the nature of what are usually characterized as attractive nuisance cases. However, as the Illinois Supreme Court has recognized:

> The naming or labeling of a certain set of facts as being an "attractive nuisance" case or a "turntable" case has often led to undesirable con-

> clusions. The inclination is then to find a stare decisis pigeonhole or category. The difficulty in such a procedure is that too often the result of such a search is the reaching of irreconciliable conclusions. Kahn v. James Burton Co., 5 Ill.2d 614, 624, 126 N.E.2d 836, 841 (1955).

We must, therefore, adhere to the instruction of the Illinois court that "the only proper basis for decision in such cases dealing with personal injuries to children are (sic) the customary rules of ordinary negligence cases." Id. The court further stated:

> (W)here the owner of person in possession (of land)knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the situation is slight compared to the risk to the children . . . there is a duty upon the owner or other person in control of the premises to exercise due care to remedy the condition or otherwise protect the children

from injury resulting from it. Id. at 625, 126 N.E.2d at 842.

Applying these principles to the facts in this case we agree with the district court that, construing the evidence in the manner most favorable to the plaintiffs, no verdict for plaintiffs could stand based on the submitted evidence.

Principal among the reasons which have led to this conclusion is the fact that we have not discovered any post-Kahn Illinois case which has held an owner or possessor of land liable where the immediate cause of the injury to a child has not been either the attracting agency itself or some negligence chargeable to the defendant other than the negligence inherent in the creation or tolerance of the attraction which resulted in the child's resence. Indeed, the language of the decision of the Illinois Appellate Court in Henry v. Robert Kettel Constr. Corp., 44 Ill.App.2d 356, 194 N.E.2d (2d Dist. 1963), expressly recognized the necessity of more than mere attraction of any injury to a child to impose liability on the owner or possessor of land therefor when it said:

> Realistically the doctrine of "attractive nuisance" serves only one purpose and that is in regard to the status of the infant on the premises.

> Once an infant of tender years because of his immature judgment and inability to appreciate certain conditions is attracted and allured to the premises, he is no longer a trespasser but is to be regarded as an invitee. . . . In such case, there is a duty upon the owner or other person in possession and control of the premises to which the child is allured to exercise due care so as not to negligently injure him while he is upon the premises. Id. at 359, 194 N.E.2d at 537 (emphasis added).

With this understanding of the law of Illinois, we are unable to identify any negligence of defendant other than the obvious negligence in not preventing its employees from throwing flares to children along the right-of-way. It is also clear that the attracting agency--the giving away of flares --did not proximately cause the injuries here at issue as would have been the situation if the child had been injured by the flares themselves or struck on or near the tracks while seeking or obtaining flares.

A requirement that for liability to attach there must be negligence beyond the mere creation or tolerance of a dangerous condition attractive to children where the source of the attraction is not also the source of the injury is entirely consistent

with the customary rules of negligence law. In reality such a requirement is nothing more than the usual requirement that there be proximate causation for recovery of damages to follow. The absence of a requirement of proximate causation would have the logical result of making defendant an insurer as to injuries sustained by children without regard to who or what actually caused the injury. It is clear that such is not the law of Illinois.

In addition, the situs of the accident here at issue demonstrates the enormous burden which would be placed upon railroads if the defendant were held liable in this instance. The only methods of insuring that such injuries would not recur would be to fence the right-of-way at crossings where there is any likelihood of children's presence or to construct an overpass or underpass or place a guard at all such crossings. We do not belive Illinois law imposes any such requirement. Moreover, on the basis of the testimony before the trial court, the practice of hopping rides on defendant's trains was by no means confined to the Cargill Road crossing, and to effectively foreclose such a practice would therefore require fencing or patrolling of defendant's entire right-of-way.

Finally, the actions of the two boys at the crossing, indicate that they were in the vicinity of the railroad tracks when the accident occurred not to obtain flares but to hop a train. If their presence at the Cargill Road crossing at any prior time related to obtaining flares, that mission had clearly been abandoned by the time they placed themselves in danger of the accident which ultimately resulted. Moreover, their actions were inconsistent with a desire to obtain flares. This is so because not only was no request made for flares to be thrown to them, but also they hopped the train before the caboose (which, by the testimony of plaintiff's witnesses, was the usual source of the flares) had reached them. There is authority in the Illinois case law for the proposition that, if a child has lost interest in the attracting agency and places himself in danger by undertaking another pastime which leads to injury, such a change in mission bars recovery as a matter of law. See Briney v. Illinois Cent. R.R., 401 Ill. 181, 81 N.E.2d 866 (1948) (cited in Kahn v. James Burton Co., supra, at 625, 116 N.E. 2d at 841).

The judgment of the district court is affirmed.

APPENDIX
18a

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit.

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the United States District Court

for the Eastern District of Illinois

GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Illinois before you, or some of you, in a cause between ILLINOIS STATE TRUST COMPANY, a corporation, Guardian of the Estate of Daniel David Land, a minor and Arthur Land vs. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a corporation; No. 69-82; an order

was entered on the second day of April, 1970.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals fro the Seventh Circuit by virtue of an appeal by ILLINOIS STATE TRUST COMPANY, a corporation, Guardian of the Estate of DANIEL DAVID LAND, agreeably to the act of Congress, in such case made and provided, in fully and at large appears. a minor and ARTHUR LAND.

AND WHEREAS, in the term of September, in the year of our Lord one thousand nine hundred

and seventy, the said cause came on to be heard before the said United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

WEDNESDAY, MARCH 10, 1971

and AFTERWARDS TO WIT, a petition for rehearing was filed on March 26, 1971; on April 5, 1971 an order was entered denying

the petition for rehearing.

You, therefore are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, aught to be had, the said appeal notwithstanding. WITNESS, the Honorable Warren E. Burger, Chief Justice, of the United States, the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and seventy-one.

/s/ Kenneth J. Carrick
Clerk of the United
States Court of Appeals
for the Seventh Circuit

IN THE

SUPREME COURT OF THE UNITED STATES

ILLINOIS STATE TRUST COMPANY, a Corporation, Guardian of the Estate of DANIEL DAVID LAND, a Minor, and ARTHUR LAND, Petitioners,

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a corporation, Respondent.

CERTIFICATE OF SERVICE

WILLIAM B. STARNES, being first duly sworn upon his oath, deposes and says that he is one of the attorneys for the petitioners herein and that he did on the 25th day of July, 1971, place three copies of the Petition for Writ of Cetiorari in an envelope, clearly addressed to Norman Gundlach, 6400

West Main Street, Belleville, Illinois.

postage prepaid.

William B. Starnes

WILLIAM B. STARNES
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-129

ILLINOIS STATE TRUST COMPANY, a Corporation, Guardian of the Estate of DANIEL DAVID LAND, a Minor, and ARTHUR LAND,
Petitioners,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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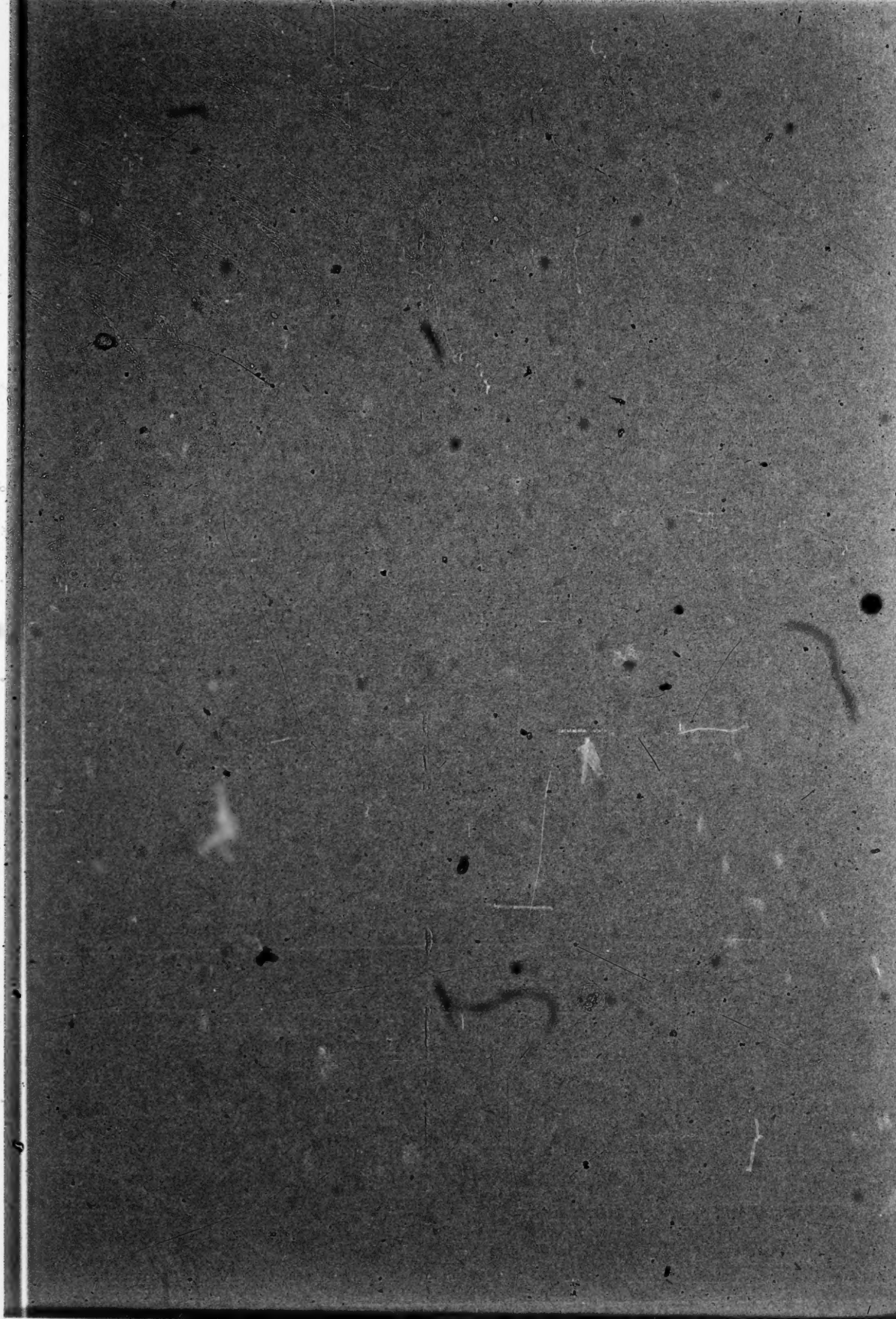

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-129

ILLINOIS STATE TRUST COMPANY, a Corporation, Guardian of the Estate of DANIEL DAVID LAND, a Minor, and ARTHUR LAND,
Petitioners,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Illinois State Trust Co., etc. v. Terminal Railroad Association of St. Louis, 440 F. 2d 497 (1971) Advance Sheet June 14, 1971.

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in denying plaintiff's motion to remand the cause to the State Court from which it was removed?

2. Did the District Court err in granting defendant's motion for a directed verdict?

STATEMENT OF THE CASE

The statement of facts in the opinion written by Chief Judge Swygert is succinct and concise (Appendix 7a of the Petition for Writ of Certiorari).

Counsel for petitioner has inferred, contrary to the evidence that the engineer saw David Land and Jimmy Bell at the crossing or hopping this train at the crossing. Curtis White, the engineer, saw a boy and a dog approximately 25 car lengths after the engine had passed across the crossing when he looked back for hotboxes as the engine moved into a curve (R. 154-55).

David Land had never been to this crossing before and Jimmy Bell did not tell him why he was taking him down there (R. 78).

REASONS FOR DENYING THE WRIT

1. The ruling of the 7th Circuit Court of Appeals on the question of removal was proper under the facts and prior decisions of the 7th Circuit Court of Appeals cited in the opinion. The decision is in conformity with other Circuit Courts of Appeals. **Kelly v. U. S. Steel Corp.**, 284 F. 2d 850 (3rd CCA); **Egan v. American Airlines, Inc.**, 324 F. 2d 565 (2nd CCA). There is a lucidating opinion of Chief Judge Robinson in the case of **Mahoney v. Northwestern Bell Telephone Co.**, 258 F. Supp. 500.

2. Chief Judge Swygert properly interpreted and applied the applicable law of Illinois.

Plaintiff's counsel relies upon the case of **Kahn v. James Burton Co.**, 5 Ill. 2d 614, 126 N.E. 2d 836 (1955) which is the only case of the Supreme Court of the State of Illinois cited by him. The Supreme Court of Illinois, at page 624, lays down the applicable Illinois rule wherein it is stated:

"It is generally true, as defendant contends, that an owner or one in possession and control of premises is under no duty to keep them in any particular state or condition to promote the safety of trespassers or others who come upon them without any invitation, either express or implied. **(Briney v. Illinois Central Railroad Co.**, 401 Ill. 181; **Darsch v. Brown**, 332 Ill. 592.) It is also established that infants, as a general rule, have no greater rights to go upon the land of others than adults, and that their minority of itself imposes no duty upon the occupier of land to expect them or prepare for their safety. **(Burns v. City of Chicago**, 338 Ill. 89; **McDermott v. Burke**, 256 Ill. 401.) It is recognized, however, that an exception exists where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a **defective structure or dangerous agency** existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk to the children. In such cases there is a duty upon the owner or other person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it." (Emphasis supplied.)

It is to be observed that the Supreme Court cited the case of **Briney v. Illinois Central**, 401 Ill. 181 which is a case with stronger facts for the plaintiff than the instant suit and liability was not found.

The Supreme Court of Illinois in the case of **Driscoll v. C. Rasmussen Corp.**, 35 Ill. 2d 74, 219 N.E. 2d 483 **(1966)** held that there was not a submissible case when a boy living in a house across the alley went upon the premises where there was a construction trash pile and was burnt

when he ignited a paint can. In the case of **Landman v. M. Susan & Associates, Inc.**, 63 Ill. App. 2d 292, 211 N.E. 2d 407 **(1965)**, the Court affirmed a directed verdict for defendants brought on behalf of a 12 year old boy to recover for injuries resulting from sand thrown by another minor playmate while playing on a sand pile of the construction site maintained and controlled by defendant. The Court found that the injury to the minor was not the result of any hazard or danger inherent in the pile of sand or substance or its location. In the case of **Sydenstricker v. Chicago & N.W. Ry. Co.**, 107 Ill. App. 2d 427, 247 N.E. 2d 15, 18 **(1969)** it was held that a child injured while playing on defendant's railroad car on defendant's property was not entitled to have his case submitted to a jury. Similarly the rules laid down in the Kahn case were held inapplicable to injuries to a child who fell through a skylight while playing on the roof of defendant's apartment. **Colon v. Marzec**, 115 Ill. App. 2d 410, 253 N.E. 2d 669, 672 **(1969)**. A concise interpretation of the **Kahn** case and others cited by counsel for petitioner is set forth in the opinion of the **Colon** case (L.C. 672):

> "Plaintiff, in his brief, cites to us the **Kahn** case and a number of our recent decisions. Kahn v. James Burton Co., 5 Ill. 2d 614, 126 N.E. 2d 836; Halloran v. Belt Ry. Co., 25 Ill. App. 2d 114, 166 N.E. 98; Skaggs v. Junis, 27 Ill. App. 2d 251, 169 N.E. 2d 684; Smith v. Springman Lumber Co., 41 Ill. App. 2d 403, 191 N.E. 2d 256; Stewart v. DuPlessis, 42 Ill. App. 2d 192, 191 N.E. 2d 622; American Nat. Bank & Trust Co. v. Penn. R. Co., 52 Ill. App. 2d 406, 202 N.E. 2d 529; Dallas v. Granite City Steel Co., 64 Ill. App. 2d 409, 211 N.E. 2d 907. It is enough to say that through these cases run a comman thread; in each, the owner or possessor of premises known to be frequented by small children negligently maintained a **hazardous** or

> **dangerous condition**; and the burden of eliminating the **hazard or danger was slight compared with the risk to the children involved.** This common thread distinguishes those cases from the one before us." (Emphasis supplied.)

The applicable law of Illinois for verdict directing is stated in **Pedrick v. Peoria & Eastern R.R. Co.**, 37 Ill. 2d 494, 229 N.E. 2d 504, the Court stated (L.C. 510):

> ". . . But the presence of some evidence of a fact which, when viewed alone may seem substantial, does not always, when viewed in the context of all the evidence retain such significance. As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole. Constitutional guarantees are not impaired by direction of a verdict despite the presence of some slight evidence to the contrary . . . for the right to a jury trial includes the right to a jury verdict only if there are factual disputes of some substance."

Neither boy saw any member of the crew on the engine or caboose. David had never been at the crossing to ask for flares and his friend, Jimmy, did not tell David where he was taking him. If David and Jimmy were on any mission after they arrived at the crossing, it had not started when David attempted to hop the train. There was no evidence to show that David had any knowledge of the habits of other boys with respect to asking for flares or that he was at the intersection of the tracks and Cargill Road as a result of any implied invitation from the defendant. There was no evidence to show that the boys were in the habit of hopping trains or that the defendant had any knowledge of or any reason to believe that boys were hopping trains.

CONCLUSION

The Federal question was properly decided under applicable decisions. The State question likewise was decided properly under the State law. Therefore there are no special or important reasons under Rule 19(b) of this Court to assert jurisdiction and the petition should be denied.

Respectfully submitted

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